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No. 10-865

In the Supreme Court of the United States

SCOTT WYNNE, PETITIONER

v.

PAUL RENICO, WARDEN

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court's reasoning in *Harrington* v. *Richter*, 130 Ct. 770 (2011) make clear that a State appellate court in habeas corpus—consistent with *Early* v. *Packer*, 537 U.S. 3 (2002)—that a State court adjudication is entitled to deference where that court provides no analysis on the constitutional grounds but only on state evidentiary grounds in rejecting the Petitioner's claim of error?

2. Does Petitioner present a conflict in the federal circuits on the constitutional right to present a defense where the only federal circuits that have ruled that Fed. R. Evid. 404(b) should be construed to apply to criminal defendants alone did so on evidentiary grounds, rather than constitutional grounds?

3. Does Petitioner provide a good vehicle to address the legal issue raised in his petition in this factually intricate case where any error was harmless and the propensity evidence excluded by the State trial court was of limited probative value and Petitioner was able to challenge the credibility of the prosecution's witness at issue?

PARTIES TO THE PROCEEDING

Petitioner is Scott Wynne, who was convicted in a Michigan court of two counts of first-degree felony murder, two counts of armed robbery, and one count of conspiracy to commit armed robbery. Respondent Paul Renico was the warden of the prison where Petitioner was serving his sentence.[1]

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[1] Petitioner's current warden is Carol Howes. < http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=247226 > and < http://www.michigan.gov/corrections/1,1607,7-119-1381_1388-5371--,00.html > (last accessed March 30, 2011).

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On December 3, 1999, the Michigan Court of Appeals affirmed Petitioner's convictions of first-degree premeditated murder. Pet. App. 108-120. On September 26, 2000, the Michigan Supreme Court denied Petitioner's application for leave. Pet. App. 121.

Petitioner timely filed a petition for a writ of habeas corpus. In 2003, the district court granted habeas relief on Petitioner's first claim—the constitutional right to present a defense. Pet. App. 45-106. In 2004, the Sixth Circuit issued an order remanding the matter to the district court to address the "factual discrepancies." In 2009, the district court issued a supplemental order, again granting habeas relief. Pet. App. 18-43. The district court found the factual mistakes in Petitioner's original brief to be "serious," but in the end that it did not change the district court's initial analysis. Pet. App. 42.

The United States Court of Appeals for the Sixth Circuit reversed the district court's grant of habeas relief in a published opinion. Pet. App. 1-17.

JURISDICTION

The State of Michigan agrees that Petitioner timely filed a petition for certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in Petitioner's petition. Pet. 2. The State has laid out the other relevant provisions in the appendix to this brief. 1a-2a.

INTRODUCTION

Petitioner's claim that there is a conflict between the federal circuits on this issue is not supported by the cases. Rather, the few federal circuits that have examined this issue *on constitutional grounds* have either supported the decision here or otherwise reserved the question whether there could be a circumstance in which there could be evidence that is inadmissible under Fed. R. Evid. 404(b) but must be included based on a criminal defendant's constitutional right to present a defense. The only court that arguably conflicts with the decision here is the Connecticut Supreme Court in 2010, but this does not reflect either an established or mature conflict.

Even if there were a mature conflict, it would be precisely the fact that a circuit split exists that would bar the issue's consideration in this proceeding. That is because this is a habeas corpus case, subject to the Anti-Terrorism and Death Penalty Act (AEDPA). The fact that the State court did not expressly engage in a constitutional analysis did not deprive the decision of deference under *Early* v. *Packer*, 537 U.S. 503 (2002). Likewise, based on this Court's recent decision in *Harrington* v. *Richter*, 130 S. Ct. 770 (2011), the State court decision here would be subject to habeas deference. In the same way that a summary order on the merits is entitled to deference in *Harrington*, so the decision of the Michigan courts here is entitled to deference where it rejected the merits of Petitioner's claim of error, even though the adjudication provides no analysis on the constitutional grounds but examines it on State evidentiary grounds alone.

Under AEDPA, a petitioner is not entitled to relief unless he can demonstrate that his conviction resulted from the contrary to or an unreasonable application of clearly established Supreme Court precedent. Petitioner has asked this Court to settle what it claims is a circuit conflict; by definition then, there is no clearly established federal law that could form the basis of AEDPA relief. As a result, the petition should be denied.

Moreover, this petition does not merit this Court's review for other additional reasons.

This is a poor vehicle to review this claim because any error was harmless in light of the strong evidence of Petitioner's guilt, so that any decision here would not result in a reversal of Petitioner's conviction.

This is also a poor vehicle to review the claim because the factual arguments advanced here are intricate and controverted. There was significant other non-propensity evidence that was introduced to impeach one of the prosecution witnesses, and the propensity evidence that Petitioner sought to introduce was of limited probative value. Petitioner's right to present a defense was not compromised regardless of the standard applied here.

This Court should deny certiorari.

STATEMENT OF THE CASE

Following a jury trial in a Michigan court, Petitioner Scott Wynne was convicted in Allegan County Circuit Court of first-degree premeditated murder. This habeas corpus case started as a rural Michigan land dispute. Petitioner murdered Philip Timmerman because Petitioner believed that Timmerman had swindled Petitioner's mother into granting a long-term lease to a part of the Wynne family homestead.

Because this first-degree premeditated murder case involves a right-to-present-a-defense claim, the petition is framed by (1) the prosecution evidence; (2) what theories and evidence Petitioner was able to present; and (3) the pure propensity evidence regarding a third-party witness that was excluded on evidentiary grounds.

The Sixth Circuit's opinion, authored by Judge Sutton, described the facts produced at the State trial against Petitioner:

> On May 18, 1995, Timmerman was shot to death while working on his farm. No eyewitnesses to the shooting emerged, but several pieces of physical evidence linked [Petitioner] to the crime. Ballistics evidence identified [Petitioners'] .45 caliber pistol as the murder weapon. [Petitioner's] fingerprint appeared on the weapon's ammunition magazine. And footprints at the crime scene matched boots found in [Petitioner's] house. [Petitioner] also had a motive. Three days after the shooting, [Petitioner's] friend Mark

> Peckham contacted the police, telling them that he had heard [Petitioner] say he wanted to kill Timmerman on several occasions, apparently because he thought Timmerman's long-term lease on the Wynne family farm would terminate upon Timmerman's death. [Petitioner] was so frustrated about his land dispute with Timmerman, Peckham said, that he spoke with Peckham ten to thirty times about murdering Timmerman, sometimes in conversations that turned into detailed descriptions of how he would carry out the crime. [Pet. App. 2-3.]

At his State trial, Petitioner was able to present non-propensity evidence to probe Peckham's credibility and to suggest that that Peckham may have framed Petitioner. The Sixth Circuit summarized the defense theory and corresponding evidence:

> As part of his defense, [Petitioner] alleged that Peckham had killed Timmerman. The trial court allowed [Petitioner] to introduce the following evidence to support this theory: Peckham wanted to frame him to retaliate for various wrongs, including [Petitioner's] purported firing Peckham five months before the murder; Peckham acknowledged he had fired some of [Petitioner's] guns in the past and knew where [Petitioner] kept most of his guns, including the .45 caliber murder weapon; Peckham told an investigator he was "really pissed" at [Petitioner] because [Petitioner] "had everything given to him and never returned anything to [his] family," and

> Peckham's insurance agent testified that Peckham had told him at least three or four times in the week after [Petitioner's] arrest that Peckham was "going to put [Petitioner] away[.]" [Pet. App. 8 (citations omitted).]

Petitioner attempted to present at trial pure propensity evidence against Mark Peckham, a prosecution witness. The Sixth Circuit detailed the extraneous propensity evidence—in a list of five times—that the State trial court would not allow Petitioner to present:

> The trial court, however, drew the line at evidence directed only to Peckham's bad character. [1] The court excluded testimony by Peckham's former girlfriend that, eight years before the murder when she was in middle school, he had threatened to cut off the fingers of a classmate who touched her breasts. [2] It excluded her testimony that several years earlier, Peckham had abused her and threatened to kill her and that Peckham's trailer mysteriously burned down within hours of their break-up. [3] It excluded testimony that, after a failed suicide attempt five years earlier, Peckham declined psychologically, becoming "passive aggressive" and intent on exacting revenge in secretive ways. [4] And it excluded evidence of Peckham's alleged admission to a co-worker several months before the murder that he had "done something so bad in his past that if the police ever found out about it he would go to prison for life."

> [5] The trial court also excluded evidence about Peckham's apparent interest in women's underwear. At some point during the trial, [Petitioner's] investigator discovered a blue bag in [Petitioner's] house, which contained a boot with tread that matched the footprints found at the crime scene. The defense did not mention until several days after delivering the bag to the court that it found a black camisole near the bag. With this evidence, the defense sought to link Peckham to the bag via his apparent underwear fascination, but the court would not allow it. [Pet. App. 4 (citations omitted; bracketed numbers inserted).]

REASONS FOR DENYING THE PETITION

Based on the standards established by this Court in *Early*, 537 U.S. at 503, and confirmed by *Harrington*, 130 S. Ct. at 770, the merits decision by the Michigan Court of Appeals rejecting Petitioner's claim of error is entitled to deference under AEDPA. Thus, this case is a poor vehicle in which to examine the legal issue here because even if there were a circuit split, there would be no clearly established law from this Court on the issue.

And the claim that there is a federal circuit split is overstated in any event. For the cases cited by Petitioner, they either have examined the issue on evidentiary grounds alone, did not rule on the issue, or ruled consistent with the decision here. The only possible split relates to a decision from the Connecticut Supreme Court. There is no mature or established conflict requiring this Court's review.

Moreover, with the powerful facts produced at trial, any error was harmless.

And the facts here are intricate, are controverted, and the propensity evidence excluded was of limited value. Given the evidence that the State trial court admitted, Petitioner was not deprived of his right to present a defense. Garden-variety evidentiary rulings—like placing a limitation on the admission of propensity evidence—do not necessarily implicate constitutional protections that require this Court to mandate the mechanics of these rulings, thereby invading the province of state courts.

I. The issue whether the State court decision was entitled to deference under AEDPA is a threshold issue, which would eliminate the need to review any possible circuit conflict.

Petitioner raises two claims in asking this Court to grant certiorari. Petitioner argues that the decision here conflicts with this Court's prior decisions, Pet. 15-17, and that there is a circuit split on this issue, Pet. 18-24. Neither provides a basis on which to review this petition.

A. The Sixth Circuit's decision does not conflict with any decision of this Court.

There is no decision of this Court that has reviewed this issue. This Court has not reviewed the question whether a criminal defendant has a right to introduce propensity evidence against a third party in support of the claim that such a person is the "real" killer—where that evidence would not otherwise be admissible under the rules of evidence, 404(b).

The cases cited by Petitioner from this Court do not answer this claim. Pet. 15-17. Rather, these cases address the right to present a complete defense in other factual circumstances—not as in the issue presented here. For example, in *Crane* v. *Kentucky*, 476 U.S. 683 (1986), this Court examined the propriety of excluding evidence of the circumstances in which the police obtained a confession from the defendant. *Id.* at 691. That is a significantly different issue than the one here. The fact that a court may not constitutionally exclude evidence about the voluntariness of a confession does not resolve the issue whether a court may exclude propensity evidence when introduced

against a third party (non-defendant). The decision below does not conflict with this Court's prior decisions.

B. This Court's decisions in *Early* and *Harrington* make clear that the decision here was entitled to AEDPA deference.

This Court in *Early* made clear that a State court decision that resolves the merits of a claim is entitled to deference even if it does not cite any constitutional standards:

> A state-court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Avoiding these pitfalls does not require citation of our cases—indeed, *it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.* [*Early*, 537 U.S. at 8 (emphasis added).]

Although the Sixth Circuit reviewed the matter de novo, Pet. App. 5 ("give fresh review"), the adjudication was entitled to deference.

This legal point was confirmed in January 2011, after the Sixth Circuit decision here and after Petitioner filed the present petition. This Court issued its decision in *Harrington* concluding that a summary order—without reasoning—that disposes of a

Petitioner's claim is entitled to habeas deference. Like *Early*, that same reasoning applies here.

In *Harrington*, the order at issue was a "one-sentence summary order" that did not include "an accompanying statement of reasons" for the decision. Slip. op. 2, 6. This Court then held the decision *itself*, rather than the reasoning underlying the decision, receives the deference from the AEDPA statute:

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated. [Slip. op. 8-9.]

The Court further explained that it is "presumed" that the state court adjudicated the claim on the merits "in the absence of any indication or state-law procedural principles to the contrary." Slip. op. 9.

Here, Petitioner's claim of error—that the evidence that Peckham was the real killer was wrongfully excluded—was addressed by the Michigan Court of Appeals on the merits. The reasoning of the Michigan court evaluated the claim on State evidentiary grounds alone and did not expressly address the claim on constitutional grounds:

> Defendant next argues that he was denied the right to impeach prosecution witness, Mark

> Peckham, and demonstrate that Peckham had committed the murder. *We disagree.* Defendant offered evidence in the form of testimony of other "witnesses" concerning various things Peckham had said or done in the past. Testimony regarding Peckham's past violence and criminal acts, offered to prove that he acted in conformity therewith, constituted improper impeachment under Mich. R. Evid. 404(b). Testimony regarding his sexual proclivities was inadmissible because it was unrelated to truthfulness. [Pet. App. 109 (emphasis added).]

The reasoning of this Court's decisions in *Early* and *Harrington* apply to the adjudication of the decision here. The fact that the Michigan Court of Appeals did not provide express analysis on the constitutional underpinning of the claim of error does not mean that the Court was not adjudicating this basis for the claim. This is particularly true where—as here—the State evidentiary analysis is related to, and intertwined with, the proper constitutional analysis.[2]

Under Michigan law, evidence inadmissible under Mich. R. Evid. 404(b) is excluded because character evidence is unreliable and not strongly probative. See, e.g., *People* v. *Crawford*, 458 Mich. 376, 393; 582 N.W.2d 785, 794 (1998)("The other probative danger underpinning the character evidence prohibition is the risk that the jurors will overestimate the probative

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[2] In support of this point, it is worth noting that the district court here concluded that the Michigan Court of Appeals did not "directly" address the question of the decision under the right to present a defense. Pet. App. 71.

value of character as a predictor of conduct."). And there can be no dispute that the right to present a defense must yield to ordinary evidentiary rules where the evidence sought to be admitted is unreliable. See *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998).

Even if the State accepts that there is a circuit split on this issue, if given habeas deference, the State court decision would not provide an opportunity for this Court to review the issue presented. Where there is a circuit split, this fact provides support for the conclusion that a state court adjudication is not unreasonable for reaching a decision that is consistent with one set of federal courts over another. See *Price* v. *Vincent*, 538 U.S. 634, 643 (2003)("This was not an objectively unreasonable application of clearly established law as defined by this Court. Indeed, numerous other courts have refused to find double jeopardy violations under similar circumstances.").

Significantly, all of the nine cases cited by Judge Martin in his dissent here to show a circuit split were direct review cases. Pet. App. 12 n.3. Seven of the cases are direct review arising from federal criminal convictions. *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir. 1987); *United States* v. *Blum*, 62 F.3d 63 (2nd Cir. 1984); *United States* v. *Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *United States* v. *Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States* v. *Sepulveda*, 710 F.2d 188 (5th Cir. 1983); *United States* v. *Lucas*, 357 F.3d 599 (6th Cir. 2004); *United States* v. *McCourt*, 925 F.2d 1229 (9th Cir. 1991); and *United States* v. *Morano*, 697 F.2d 923 (11th Cir. 1983). One case is a direct review from a state conviction. *State* v. *Hedge*, 1 A.3d 1051 (Conn. 2010).

And one case arises from a 42 U.S.C. § 1983 civil action. *Agushi* v. *Duerr*, 196 F.3d 754 (7th Cir. 1999).

There is no clearly established law on this point.

C. There is no established circuit split on whether such evidence is constitutionally required in any event.

On the reverse-404(b) evidence issue here, the Sixth Circuit premised its analysis on its previous decision in *Lucas*, 357 F.3d at 599. Pet. App. 7-8. In *Lucas*, the Sixth Circuit held that "the standard analysis for Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime." *Lucas*, 357 F.3d at 606. The Sixth Circuit then noted that the evidence there did not meet any of the rules exceptions, and alternatively, even if it had, the trial court's balancing of the probative value versus the prejudicial effect was not in error. *Lucas*, 357 F.3d at 606. The Sixth Circuit held that under this process "that Lucas was not prevented from presenting a complete defense." *Lucas*, 357 F.3d at 606.

It is against this analytical backdrop that Petitioner contends that there is a "profound split" of authorities on the constitutional right to present a defense. There are nine cases cited by Judge Martin, and relied on by the petition, Pet. 18-23, n.2 in support of the contention that there is a circuit split on this issue, but the cases from other jurisdictions do not support this conclusion.

Three of the circuit cases are not reverse-404(b) cases at all but were circumstances in which the

prosecution introduced the evidence. *Gonzalez-Sanchez*, 825 F.2d at 572 ("We find little merit in [defendant's] challenge to the evidence concerning his counseling of gang members in connection with the van thefts."); *Sepulveda*, 710 F.2d at 188 ("Defendant maintains that testimony relating to the heroin transaction was "extrinsic evidence" and should have been excluded under Fed. R. Evid. 404(b)"); and *Morano*, 697 F.2d at 923 ("[Defendant] claims that it was reversible error for the district court to allow evidence of [the witness's] prior arson convictions and testimony concerning his unusual method for starting fires."). Because the evidence was used by the prosecution against the defendant—not the defendant seeking to use to claim someone else committed the crime—it does not implicate a criminal defendant's right to present a defense.

Also, in determining that the Fed. R. Evid. 404(b) applies to third parties, the Seventh Circuit was examining this issue in a civil context in which a criminal defendant's constitutional right to present a defense was not implicated. *Agushi*, 196 F.3d at 761. This case does not support a claim of a circuit split.

Moreover, two of the circuits reviewed and determined that the evidence the criminal defendant sought was admissible under 404(b) as an evidentiary matter of federal law, rather than as required by the constitutional right to present a defense. See *Blum*, 62 F.3d at 63 ("As evidence directly relevant to showing motive it plainly was admissible under Fed. R. Evid. 404(b)."); and *Aboumoussallem*, 726 F.2d at 911-912 ("We disagree with the District Court to the extent it

excluded the proposed testimony as irrelevant or as inadmissible under Rule 404(b).").

In *Blum*, the Second Circuit evaluated the basis for the district court's exclusion of the evidence—Fed. R. Evid. 403 and 608(b)—and determined that the evidence was admissible under Fed. R. Evid. 404(b). The Second Circuit cited the constitutional right to present a defense but ultimately ruled on evidentiary grounds. *Blum*, 62 F.3d at 68-69. Similarly, in *Aboumoussallem*, another Second Circuit case, the analysis there was again based on evidentiary principles without an analysis under the constitutional right to present a defense. *Aboumoussallem*, 726 F.2d at 911-912. Although the Second Circuit noted that "we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword," the Second Circuit did not indicate that this standard was required by the Constitution. *Id.*

Thus, these are ultimately federal evidentiary rules—not rules required by the Constitution. The federal courts do not require the state courts to adopt their evidentiary construction of rules of evidence if not constitutionally required. See *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991)("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). As a consequence, these two cases do not provide a basis on which to contend that there is a split on whether propensity evidence is required by the constitutional right to present a defense.

Finally, the two federal circuits that reviewed this matter on constitutional grounds addressed the issue whether a criminal defendant may escape the obligations of Fed. R. Evid. 404(b) where it seeks to introduce propensity evidence to support a theory of innocence. See *Stevens*, 935 F.2d at 1380; *McCourt*, 925 F.2d at 1229.

In *Stevens*, the Third Circuit concluded that "a defendant may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations." *Stevens*, 935 F.2d at 1405. Although not a clear expression of the right to present a defense, the Third Circuit tied its analysis to the "general belief that a criminal defendant should be able to advance any evidence that, first, rationally tends to disprove his guilt, and second, passes the Rule 403 balancing test." *Stevens*, 935 F.2d at 1406.

But the Third Circuit later clarified this standard in *United States* v. *Williams*, 458 F.3d 312 (3rd Cir. 2006). Although framed as an evidentiary analysis, the Court did recognize the potential for right-to-present-a-defense implications. *Williams*, 458 F.3d at 317 n.5. In *Williams*, the Third Circuit "clari[fied]" that "Rule 404(b)'s proscription against propensity evidence applies regardless of by whom, and against whom, it is offered." *Williams*, 458 F.3d at 314. The court in *Williams* further stated that *Stevens* recognized that defendants have more leeway to present evidence under 404(b) when it relates to one of the rule's exceptions, but not for pure propensity purposes. *Williams*, 458 F.3d at 314. The Third Circuit expressly reserved the constitutional question, noting that

"[u]nder exceptional circumstances, therefore, it could plausibly be argued that a defendant has a constitutional right to present propensity evidence otherwise barred by Rule 404(b)," but that the particular case did not require the resolution of that issue. *Id.* at 314 n.5. The Third Circuit's opinion in *Williams* is substantially in line with the Sixth Circuit's analysis in *Lucas* and the case here.

Similarly, the Ninth Circuit in *McCourt* determined that the proscriptions in 404(b) are not limited to an accused. *McCourt*, 925 F.2d at 1232. The court then concluded that the trial court had not erred in disallowing the evidence where 404(b) prohibits propensity evidence, regardless of who offers it, although it may be admissible for "other relevant purposes." *McCourt*, 925 F.2d at 1235-1236. The court concluded that the ruling did not impair the right to present a defense because he was able to present evidence "the jury could have inferred that [the third party] was the more likely culprit." *McCourt*, 925 F.2d at 1236 n.12. The Ninth Circuit's conclusions in *McCourt* are substantially consistent with *Lucas* and the case here.

If there is a conflict, it arguably relates to the Connecticut's Supreme Court decision in *Hedge*, 297 Conn. 621 (2010). In addressing the admissibility of reverse-404(b)-style evidence, the Connecticut Supreme Court concluded that the evidence had to meet one of the Connecticut rule's exceptions, and then, the probative value had to outweigh the prejudicial effect. The court ultimately concluded that the constitutional right to present a defense required the admission of the evidence because "the trial court's

exclusion of the defendant's third party culpability evidence violated the defendant's right to present a defense." *Hedge*, 297 Conn. at 654.

Any conflict here has not matured and does not merit action by this Court at this time. There is no established conflict between the federal circuits on the issue as a constitutional matter.

II. This case is a poor vehicle for addressing this issue because the extraneous propensity evidence relating to Peckham, if error, was harmless.

The evidence against Petitioner was very strong and was comprised of three separate items: (1) Petitioner had a clear motive in light of a running family land dispute and Petitioner had mentioned killing Timmerman on several occasions; (2) ballistics evidence identified Petitioner's .45 caliber pistol as the murder weapon and Petitioner's fingerprint appeared on the weapon's ammunition magazine; and (3) footprints at the crime scene matched boots found at Petitioner's home.

Fairly viewed, the record shows that even if the State trial court somehow erred in excluding the additional evidence regarding Peckham, the error did not have a substantial and injurious effect or influence in determining the jury's verdict.

This Court held in *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993) that habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Reversal of a conviction on habeas review is allowed only if the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631.

A. The trial evidence demonstrated that Petitioner had a motive to murder the victim.

Petitioner's mother, Judy Wynne, testified that around 1980 she and her husband, Edwin, had leased land to the Timmermans and that this was a verbal agreement, not written. R 12, IX 137-138. The land surrounded their home and was known as the "West 80" and the "East 80." In 1989, Judy Wynne sold the West 80 and leased a portion of the East 80 to the Timmermans. Both transactions were reduced to writing. R 12, IX 139-140.

Judy Wynne then testified that in September of 1992, there was a second lease drawn up that included an option for her children to purchase the land. The new lease was signed with victim, Philip Timmerman, in 1993, effective in January 1994, and gave her children a 5-year option to buy the land from her. Mrs. Wynne conceded that the amended lease nevertheless included a 30-year lease for the Timmermans and that she did not entirely understand that part of it when she signed the lease. R 12, IX 145.

Judy Wynne testified that a couple of years after Petitioner returned from Florida, in approximately 1991, he became aware of the 1989 lease and was "extremely mad" at her for that. R 12, IX 146-147. She tried to eliminate the 30-year lease portion of the agreement, but Philip Timmerman would not agree to that. R 12, IX 148. Most importantly, Judy Wynne testified that she had spoken to the victim about purchasing back his interest in the land a few months prior to the murder during February or March 1995. She told Timmerman that she had heard rumors that

he may want to sell the property, but Timmerman said that he wanted to retain it. R 12, IX 151-153. Later in the trial, Mrs. Wynne testified Timmerman refused her offer to buy back the land during the 1995 meeting. R 12, X 29-30.

Many witnesses were unaware of the crux of the dispute: Timmerman had *possession* of the land and Petitioner wanted it back. Mark Peckham had discussions with Petitioner about the property dispute. R 12, VI 65. Petitioner also told John Brokus, a business associate, that he was upset at his mother for giving up the land without talking to him. R 12, VII 162. Petitioner also told Ben Koteras that he had seen a lawyer about trying to get out of the lease. R 12, VII 190. He told Norma Kawka the same thing. R 12, IX 44. Petitioner complained to Elizabeth Carns about the land dispute and told her of his anger towards Timmerman. R 12, VII 196-200.

Just a few days prior to the murder, Petitioner told Mark Pentacost about the land dispute with the victim, that it was upsetting, and how he hoped his attorney would work it out. R 12, IX 221-222. Petitioner also expressed his frustrations to Robert Clark. R 12, V 270-271. Ben Koteras testified that even hours before the murder, Petitioner told him that he had just had "words" with the victim. R 12, VII 191-192. Even Petitioner admitted that he was upset over the sale of his family's property to Timmerman when he was questioned by police after the murder. R 12, III 220-221; R 12, IV 13.

Accordingly, the motive for this murder was Petitioner's escalating quarrel with Timmerman that stemmed from Timmerman's refusal to release his

long-term interest to land that Petitioner felt should, by right, have stayed with his family. The quarrel progressed from angry words to felonious acts of vandalism. R 12, XII 156.

B. The physical evidence linked Petitioner to the murder.

After working a long day in his fields, the victim was shot to death while he was working near a piece of farm equipment between 10:22 and 10:37 p.m. on May 18, 1995. R 12, V 220, R 12, VII 121. He was shot nine times: eight times with .45 caliber bullets, and once with a .22 caliber bullet. R 12, II 182-183. Two farm hands were working with the victim planting corn on the night of the murder. One farm hand, Brent DeWeerdt, called the other farm hand, Keith Kohtz, on a tractor radio after hearing the shots and finding Timmerman lying on the ground. R 12, II 76-84. Kohtz testified that it was 10:38 p.m. by the clock in his tractor when DeWeerdt radioed him. R 12, II 141. When Kohtz reached the scene he called 911 from a cellular phone, R 12, II 141-147, which was placed at 10:42 p.m. R 12, II 76-78, 143, 162-66, 164.

The distance from the scene of the crime to Petitioner's residence was 1.53 miles. R 12, III 23. Two sets of footprints were found in the field at the homicide scene leading towards a nearby abandoned railroad grade, and a police dog tracked a human scent along one path to the side of a field where an area of the grass was matted down. R 12, III 57-62. A cast of a footprint found at the crime scene believed to be the perpetrator's was made. R 12, III 172. Shell casings and a spent .45 caliber cartridge buried in the ground

under where the victim was lying were also taken into evidence. R 12, III 177-178, 185, 189.

Later the next day, a .45 caliber Ruger semi-automatic pistol was found by Allegan County Sheriff David Haverdink hidden above the tiles in the ceiling of Petitioner's bedroom. R 12, III 191, 214-217, IV 166-167. A firearms expert testified that the bullets recovered from the victim's body as well as the casings and bullet found at the scene matched the pistol discovered in Petitioner's room and no other gun. R 12, IV 187-204. A latent fingerprint examiner also testified that a latent print was discovered on an ammunition magazine found in the holster for the pistol came from Petitioner and no other person. R 12, V 180-181.

Petitioner was brought in for questioning the day after the shooting. Petitioner contends that Petitioner's gun was only recovered because Petitioner insisted that police search for it a second time at his house after they failed to discover it during a first search. Pet. 8. The record indicates otherwise. Detective O'Reilly, Sheriff Haverdink, and several deputies arrived at the Wynne residence with a search warrant the day after the murder. R 12, III 210-211. O'Reilly made contact with Petitioner outside the residence at about 7:45 p.m. R 12, III 214. O'Reilly took him into custody and transported him back to the Sheriff's Department for an interview. R 12, III 215-217. During the interview, Petitioner informed O'Reilly that he routinely kept a .45 handgun on his bedpost. R 12, III 222-223. After O'Reilly's officers failed to locate the .45 on the bed-post, it was Detective Haverdink who decided to initiate a more thorough search of the house. R 12, IV 146-150. Haverdink testified that he was the one who

decided "let's look one more time, be sure we look in every area." R 12, IV 147. He was also the one who decided to check above the ceiling tiles. R 12, IV 148-149. The gun was *not* recovered because Petitioner insisted that police keep searching for it; it was located because a thorough search was conducted.

Over one week into the trial, Petitioner's trial counsel revealed that his investigators had discovered a canvas duffel bag in Petitioner's residence which contained several items. R 12, VI 3-9. The bag contained: a military belt, canteen, knife, tear gas canister, leather gloves, socks, hat, articles of camouflage clothing, loose ammunition, and a camouflage face painting kit. R 12, IX 18-24. A latent fingerprint found on the tear gas canister was identified as belonging to Petitioner. R 12, IX 85-93. An expert in footprint and trace evidence testified that the boots found in the duffel bag matched the cast of the impression taken at the scene. R 12, IX 111. Petitioner's mother identified the boots found in the duffel bag as similar to the type Petitioner wore. R 12, IX 187. Petitioner's sister identified a camouflage shirt found in the duffel bag as her military issue clothing, and she acknowledged that she had previously given Petitioner several pairs of her camouflage clothing. R 12, IX 130-131.

C. There was strong circumstantial evidence that implicated Petitioner.

Apart from the fact that the victim was killed with Petitioner's gun which was found hidden in his room, and that boots discovered in Petitioner's house were worn by the perpetrator, other strong circumstantial evidence proved that Petitioner committed the crime.

First, there was evidence presented indicating that Petitioner on previous occasions had vandalized the victim's property. Peckham testified that Petitioner had slashed tires on the victim's tractors on previous occasions. R 12, VI 67-70, 81. Peckham also testified about the times Petitioner expressed a desire to kill the victim. Petitioner described different ways he could kill Timmerman, including doing so in a field while the victim was farming. R 12, VI 75-80. Petitioner's admissions to the vandalism was not confined to Peckham's testimony. His account was corroborated by Petitioner's former girlfriend, Elizabeth Carns. She testified that Petitioner admitted to her that he had slashed the victim's tractor tires. R 12, VII 200. Ken Timmerman, the victim's brother, described the tire slashing incident. R 12, VII 218, V 40, VII 95-100.

Second, evidence also indicated that Petitioner and the victim had words on the day of the murder, and that Petitioner was angry that evening as a result. On the evening of the murder, Ben Koteras stopped by to visit Petitioner. R 12, VII 178. When he arrived Petitioner was target practicing with his pistol in the yard. Koteras mentioned to Petitioner that on his way over he had seen the victim in his field. Petitioner responded that he knew that and that he had had "words" with the victim earlier that day. To Koteras, it appeared that Petitioner was target shooting with a .22. R 12, VII 188. The .22 used in the murder was never recovered.

In sum, the case presented against Petitioner was strong: he was engaged in a land dispute with the victim that had already escalated to acts of felonious vandalism, he had made statements about planning to

murder the victim, he was seen target shooting hours before the murder after just having "words" with the victim, the victim was shot dead with Petitioner's gun which was found hidden in his bedroom, and boots found hidden in the house were identified as having been worn at the crime scene.

III. This case is also a poor vehicle for addressing the issue raised in the petition because it is a fact-bound inquiry.

A. Petitioner was not denied his constitutional right to present a defense—the State trial court gave Petitioner wide latitude in exploring Peckham's motives.

The right to present a defense has long been recognized as a "fundamental element of due process." *Washington* v. *State*, 388 U.S. 14, 19 (1967). Nevertheless, "[a] defendant's right to present evidence is not unlimited, but rather is subject to reasonable restrictions." *Scheffer*, at 523 U.S. 308; *Crane*, 476 U.S. at 690. A defendant's interest in presenting evidence may "bow to accommodate other legitimate interests in the criminal trial process." *Scheffer*, 523 U.S. at 308; *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). There is no unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence; the exclusion of evidence does not violate the Due Process Clause unless it offends some fundamental principle of justice. See *Montana* v. *Egelhoff*, 518 U.S. 37, 42-43 (1996).

State and federal rule-makers generally have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials" and "[s]uch rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308, quoting *Rock*, 483 U.S. at 56.

Here, the State court evidentiary ruling under Mich. R. Evid. 404(b) was neither arbitrary nor disproportionate. And it did not deprive Petitioner of his right to a defense.

The crux of Petitioner's claim is that he was denied a fair opportunity to present evidence to impeach prosecution witness Peckham and suggest that he committed the murder and framed Petitioner. In contrast, the State of Michigan contends that the State trial record shows that defense counsel was given a free hand in attacking Peckham's credibility, in suggesting that he had a motive to falsely accuse Petitioner, and in suggesting that he had a motive and opportunity to frame Petitioner for the murder.[3]

Peckham's jealousy and motive

During Petitioner's cross-examination of Peckham, defense counsel was freely allowed to delve into various lines of questioning both seeking to impeach Peckham and to suggest he had a motive and opportunity to commit the murder.

Defense counsel was allowed to suggest that Peckham was jealous of Petitioner's position in the Wynne family and to suggest that Peckham therefore had a motive to frame Petitioner. Peckham testified that the Wynne family was like a family to him as well.

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[3] Petitioner contends that the Sixth Circuit decision is based "upon a significant mistake of fact," Pet. 11, arguing that there was no evidence that Peckham wanted to frame Petitioner or that suggested that Peckham was the murderer. Petitioner merely disagrees with the Sixth Circuit's characterization of the record, but the State contends that Petitioner did suggest at trial that Peckham framed him.

R 12, VI 115. Peckham and Petitioner were very good friends in high school, and Peckham described himself as Petitioner's only friend. R 12, VI 119-120. Judy Wynne co-signed a loan for Peckham, and when Peckham filed for bankruptcy, Peckham had to pay her back. R 12, VI 118-119. Peckham acknowledged that Petitioner's business was successful, but he denied defense counsel's suggestion that he told anyone that Petitioner "gets more than he deserves." R 12, VI 136-127. Defense counsel also suggested, over Peckham's denial, that Peckham told someone that he felt bad for Judy Wynne because Petitioner took from the family without giving anything back. R 12, VI 127. Defense counsel also suggested that Peckham had ill feelings towards Petitioner after he left employment with him. R 12, VI 131-132. Peckham denied defense counsel's allegation that he told someone that Petitioner made too much money and that Peckham did not make enough. R 12, VI 132.

Defense counsel was allowed to establish a revenge motive for Peckham by eliciting facts as to when and under what circumstances Petitioner ended his working relationship with Peckham. Peckham testified that the working relationship with Petitioner ended in November or December of 1994. R 12, VI 103-104. Defense counsel elicited testimony that after he quit working for Petitioner, Peckham moved from job to job. R 12, VI 107-108. Peckham worked for Petitioner for 11 to 13 months, his longest term of employment. R 12, VI 122. Defense Counsel elicited from Peckham that Peckham believed Petitioner had his phone shut off. R 12, VI 133-134. Peckham testified that Petitioner was not returning his calls at about the time he stopped working for him. R 12, VI 136-137. Defense counsel

made the alternate suggestion that Peckham was angry with Petitioner for selling a house to Mark Haveman instead of Peckham. R 12, VI 211.

Thomas Cole was allowed to testify that Peckham was "pissed" at Petitioner and told him that "[Petitioner] had everything given to him and that he had not returned anything to his family." R 12, X 109. Mike Densham testified that Peckham told him "I'm going to put [Petitioner] away," three or four times after Petitioner had been arrested. R 12, X 202-203. Lastly, Petitioner himself was allowed to testify regarding an alleged motive for Peckham to frame Petitioner for the murder. R 12, XI, 144-146, 149, 152.

Defense counsel accused Peckham during Peckham's cross-examination of telling Mike Densham that he was going to put Petitioner away for the crime. R 12, VI 194.

Peckham's character

Defense counsel was also allowed to bring out the fact that Peckham told people that he is a passive-aggressive person, which Peckham described as: "a person who holds in their anger and basically their anger builds within themselves and they will act out one way or another." R 12, VI 112. Defense counsel was allowed to suggest that Peckham told Matt Radke that he would get someone back without the person knowing who did it. R 12, VI 112-113. When the prosecutor objected to this line of questioning, it was defense counsel that agreed to move on. R 12, VI 113. Defense counsel suggested by his examination that this case was an example of this personality trait, because if Peckham really knew that Petitioner planned to kill

the victim, he could have told the victim or the police. R 12, VI 177-178. He likewise questioned Peckham as to why he had not reported two instances of tire slashing. R 12, VI 183-184. Defense counsel suggested by his questioning that Peckham was collecting information about tractors Petitioner had vandalized for future use against Petitioner. R 12, VI 180-181.

Matt Radke and Melissa Hill were allowed to testify that Peckham had a reputation for dishonesty. R 12, IX 275; X 5. Peggy Liechti was allowed to testify about an incident occurring on March 9, 1995, where she saw Peckham emerge from Petitioner's office holding a rifle. R 12, X 77-79.

Defense counsel also accused Peckham of telling defense witness Hinson that Peckham had a secret for which he could go to jail for the rest of his life, and that hunting men was more fun than hunting animals. R 12, VI 194-195.

Peckham's "admissions"

Defense counsel was additionally permitted to suggest that Peckham inadvertently said the word "idiot," which was recorded at the end of the tape of his police interview, and that this showed that Peckham believed Detective O'Reilly was an idiot for believing Peckham's story. R 12, VI 99-101. Defense counsel then suggested that Peckham incorporated facts about the crime he could have not have known about during the police interview. Counsel suggested that Peckham claimed Petitioner did it all on foot because he learned from Norma Kawka that Petitioner's vehicles had not moved during the time of the crime. R 12, VI 153-154.

Defense counsel pointed out that Peckham failed to reveal to Detective O'Reilly that he had spoken with Petitioner on the evening of murder by phone, though an interview was conducted only two days later. R 12, VI 160-161. Defense counsel suggested that Peckham was lying about not knowing the details of the murder since Peckham picked 10:22 p.m. as the time he left for work. R 12, VI 163-164. Lastly, defense counsel suggested through his questioning that the phone call from Petitioner to Peckham between 10:00 and 10:12 p.m. on the night of the murder was meant to be an alibi for Peckham, and not for Petitioner. R 12, VI 185. Peckham was forced to admit that this phone call was not mentioned to Detective O'Reilly during their first interview. R 12, VI 185-186.

Peckham's opportunity to "frame" Petitioner

Significantly, defense counsel was allowed to combine this attack on Peckham's personality with a suggestion that Peckham knew about Petitioner's guns, where he kept them, and how to gain entry into the Wynne house. Peckham testified during cross examination that he had last been upstairs in the Wynne house a few weeks or months prior to trial. R 12, VI 117. Defense counsel suggested that Peckham knew which bedroom belonged to Petitioner, and that Peckham knew Petitioner kept his guns near his bed. R 12, VI 121, 187-188. Peckham testified that on occasion he shot guns with Petitioner while he was working for him, including a .45 hand gun, and .22 rifles. R 12, VI 129. Peckham admitted to seeing Petitioner keep some of his guns in a gun rack in the pole barn. R 12, VI 131. Peckham admitted also that he had the access code to Petitioner's pole barn. R 12, VI 141. Peckham testified

that in December of 1994, he gained access to the pole barn to retrieve his rifle. R 12, VI 142-143.

Defense counsel also suggested that Peckham knew how to break into the Wynne home. He suggested over Peckham's denial that Peckham saw Petitioner enter through the back door of his house by using a credit card to slip the lock. R 12, VI 144. Counsel also suggested over Peckham's denial that Peckham saw Wynne family members open the locked front door by hitting it with their hip. R 12, VI 144. Peckham also denied knowing about any hidden keys to Wynne house. R 12, VI 144-145.

Defense counsel suggested that Peckham may have secured Petitioner's gun two days before the murder. He elicited from Peckham that he was at Petitioner's shop two days before murder, which was located within 100 feet of his house. R 12, VI 188-189. Peckham testified that he had borrowed Petitioner's camouflage clothes the Sunday before the murder. R 12, VI 147-148. Defense counsel also was allowed to suggest that Peckham owned his own unregistered 9 mm hand gun. R 12, VI 114-115, 125. Counsel even elicited from Peckham that he would wear camouflage clothing if he were going to commit a murder. R 12, VI 174.

Apart from the cross-examination of Peckham himself, defense counsel also was allowed to attack Peckham during his cross-examination of other prosecution witnesses. Detective O'Reilly testified that Peckham contacted police and gave information indicating the possible involvement of Petitioner in the victim's murder. Through his cross examination, though, defense counsel suggested that Peckham was aware of specific evidence when he gave his statement

to O'Reilly. R 12, IV 77. Defense counsel also inquired whether O'Reilly questioned Peckham about his own whereabouts at the time of the murder. R 12, IV 85-87.

Finally, during the cross examination of Mark Haveman, defense counsel sought to suggest that Peckham had an opportunity to obtain Petitioner's gun two days prior to the murder. He elicited from Haveman that it was odd that Petitioner's garage door was open on the Tuesday before the murder when Haveman saw Peckham on Petitioner's property. R 12, VII 47.

In summary, there was substantial evidence that Petitioner was able to present in support of his claim that Peckham was not credible and may have framed Petitioner for this crime.

B. The excluded evidence was of marginal significance.

Turning now to the excluded evidence, the State trial court only limited Petitioner when he attempted to attack Peckham based on years-old prior bad acts or matters that were otherwise wholly irrelevant to demonstrate that Peckham was motivated to falsely accuse or frame Petitioner. Reviewing the list of five pieces of evidence at issue from the Sixth Circuit decision, Pet. App. 4 (see Res. Br. 6-7) demonstrates the limited probative value of the evidence.

The Sixth Circuit identified two categories of evidence.

The first category included the evidence of bad acts from many years or months remote from the crime, and

had no relationship to the crime. This included four items: (1) Peckham's threat to "cut off the fingers of a classmate" in middle school; (2) Peckham's alleged abuse of his girlfriend and threat to kill her that occurred several years before the murder; (3) Peckham's failed suicide attempt five years earlier, becoming passive aggressive, and his intent to exact revenge in secretive ways; and (4) his alleged admission several months before the crime that he "done something so bad in his past that" he could go to prison for life. None of this proposed evidence was significant and was also excludable under the simple rules of evidence under Mich. R. Evid. 403.

The second category related to the black camisole and the bag that was found at Petitioner's home during trial.

Missy Hill-Weeks testified at the proffer of evidence that she started dating Peckham in 1985 when she was twelve-years old and he was seventeen-years old, and they dated for four and one-half to five years, R 12, IX 296, and that Peckham stole women's underwear from an apartment complex that his brother managed, and therefore had pass-key access to, R 12, IX 298-300. The underwear incidents occurred seven years before the trial. R 12, IX 303.

Accordingly, the incidents between Hill-Weeks and Peckham concerned his immature and bad behavior with a juvenile girlfriend, occurring many years before the trial, and none of which had anything at all to do with the real-life execution style murder of a grown man. Petitioner makes much of Hill-Weeks proffer about Peckham stealing women's underwear and attempts to link it to the discovery of the mysterious

camisole found in Petitioner's house near a bag containing incriminating evidence. Pet. 13-14. The record shows, however, that this petty conduct occurred when Peckham was a teenager and happened to have pass-key access to apartments managed by his brother, and when Hill-Weeks was willing to sneak into her friend's bedrooms for him. R 12, IX 302, IV 17.

At the time of trial, however, Peckham was 26 years-old, married, and had a three-year old child. R 12, IV 17. There was no evidence that this particular conduct lasted for any substantial period of time or that it continued beyond his adolescence.

Following the Hill-Weeks proffer, Petitioner's trial counsel moved to admit the evidence regarding Peckham's adolescent panty-raids by linking it to the camisole, but the trial court denied the motion as follows:

> THE COURT: Well, if you had some evidence to show that Mr. Peckham, to use the term loosely, some evidence to show that Mr. Peckham somehow surreptitiously got that blue bag into the Wynne house I suppose potentially there might be some basis to allow that underwear evidence in, but even then we're talking about something that occurred seven or eight years ago. There's nothing to show that that exists at this time. It just seems to me that there's absolutely no foundation, no relevance, nothing other than to maybe show generally that Mr. Peckham's a dislikable person. I don't see how it shows a scheme whatsoever.

> Identity, as I said, *if there was something to link up with Mr. Peckham to that bag, and there isn't, or to this crime, at least at this point, speculation, guess and conjecture, innuendo, I see nothing that would—could serve as a foundation to show scheme.* I think it's a far cry that somebody apparently gathers ladies underwear unbeknownst to them while he's in their house or whatever, or has his girlfriend do it, I wasn't clear what Melissa said as to how he got it. But anyhow, I really just think that's so remote, so far into the past that it has absolutely no relevance or probative value here except as I stated before which is not a proper basis. [R 12, IX 308-310 (emphasis added).]

The State trial court's ruling was an ordinary, evidentiary ruling that does not implicate Petitioner's constitutional right to present a defense.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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Dated: April 2011

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Petitioner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The relevant State rule of evidence is Michigan Rules of Evidence 404, which provides:

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.